(3)

No. 10-1059

MAY 18 2011

In the
Supreme Court of the United States

YANKTON SIOUX TRIBE, AND
ITS INDIVIDUAL MEMBERS,
Petitioners,

v

UNITED STATES ARMY CORPS
OF ENGINEERS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CHARLES MIX COUNTY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, STATE OF SOUTH DAKOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 3

A. The General Allotment Act of 1887 provides the background for this litigation. 3

B. Judicial Estoppel. 10

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Davis v. Wakalee,
156 U.S 680 (1895) 10

DeCoteau v. District County Court,
420 U.S. 425 (1975) 4, 5, 10, 17

Department of Transp. v. Coe,
112 Ill. App. 3d 506, 445 N.E.2d 506 (1983) .. 14

Edwards v Aetna Life Ins. Co.,
690 F.2d 595 (6th Cir. 1982) 13, 16

Hossaini v. Western Missouri Medical Center,
140 F.3d 1140 (8th Cir 1998) 11

Melton v. Anderson,
32 Tenn. App. 335, 222 S.W.2d 666 (1948) ... 16

Moe v. Confederate Salish & Kootenai Tribes,
425 U.S. 463 (1976) 10

New Hampshire v. Maine,
532 U.S. 742 (2001) 14

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 17

Scarano v. Central R.R.,
203 F.2d 510 (3d Cir. 1953) 13

Solem v. Bartlett,
465 U.S. 463 (1984) 12

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) ..... *passim*

State v. Williamson,
211 N.W.2d 184 (S.D. 1973) 12

United States v. Dion,
752 F.2d 1261 (8th Cir. 1985) 12

United States v. Dion,
476 U.S. 734 (1986) 12

United States v. Pelican,
232 U.S. 442 (1914) 5

Weddell v. Meierhenry,
636 F.2d 211 (8th Cir. 1980) 12

Yankton Sioux Tribe v. Gaffey,
14 F.Supp.2d 1135 (1998) 13, 15

Yankton Sioux Tribe v. South Dakota,
796 F.2d 241 (1986) 13

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,
99 F.3d 1439 (8th Cir. 1996) 15

Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.,
890 F.Supp. 878 (D.S.D. 1995) 15

Statutes

18 USC §1151(c) 5

Act of August 15, 1894, § 12, 28 Stat. 286 12

General Allotment Act in 1887 (Feb. 8, 1887). . *passim*
24 Stat. 388, ch. 119. 25 U.S.C. 331 2
24 Stat. 388, ch. 119. 25 U S.C. 348 ..... 4, 6

Yankton Sioux, Art. I, 11 Stat. 743. (April 19, 1858) 12

Other

Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059)(filed U.S. May 9, 2011) 15

Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932)(filed U.S. May 9, 2011) 10, 13, 15

Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos 10-929, 10-931 and 10-932)(filed U.S. Feb. 22, 2011) 2

Brief of Charles Mix County, South Dakota, as *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U S 329 (1998) (No. 96-1581) . . 11

Opening Brief for the Federal Appellant at 16, 17 n. 10, and in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985) 12

Report of Commissioner of Indian Affairs (1891) 3, 5

INTEREST OF *AMICUS CURIAE*

Charles Mix County, *amicus curiae*, has not directly participated in this litigation. Rather, Charles Mix County has always participated in the litigation in Nos. 10-929, 10-931 and 10-932. Scarce resources prompted Charles Mix County to limit participation in this fashion. The shifting sands of the arguments of the United States have now prompted Charles Mix County to file this *amicus curiae* brief to specifically make all of the arguments of the United States a matter of record in this litigation.

Prior to this litigation all courts and parties recognized that the 1858 Yankton Reservation no longer existed. Now, the reservation status of a century later, a large portion of the area of Charles Mix County, including, in whole or in part, the Cities of Dante, Geddes, Lake Andes, Pickstown, Ravinia and Wagner, is still at issue. Consequently, a significant portion of approximately six thousand (6,000) people that reside in this area still face the prospect of being suddenly thrust into the status of residents of an Indian reservation. If this were to take place, local officials would have only limited jurisdiction and the nonmembers would have no elected voice in the governance of their affairs and property by the Yankton Sioux Tribe.

That this is even a possibility after *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), where the court unequivocally rejected the arguments of the Yankton Sioux Tribe and the United States to resurrect the 1858 reservation boundary, is profoundly disturbing.

The demographics of Charles Mix County in this area are similar to other non-reservation rural counties found in the State of South Dakota and the United States. This is a county that has a significant rural farm population. In terms of agricultural productivity, the land consistently produces above average yields on a state-wide basis. Approximately ninety-eight percent (98%) of the acres in Charles Mix County are classified as farm land This farm land has an above average valuation and an above average assessed dollars per acre worth. Ninety percent of the land is owned by nonmembers and over two-thirds of the residents are nonmembers who reside on these small farms and in small towns and cities like Dante, Lake Andes, Pickstown, Ravinia and Wagner. *See also* Brief of Cities Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, *Amici Curiae*, in Support of Petitions for Writ of Certiorari, *Daugaard, et al v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932). In all, there are forty-nine (49) political subdivisions within the county.

The relentless advocacy of the United States has played a major role in this litigation. As a result, the amicus curiae brief of the County will briefly address the General Allotment Act as a backdrop and then the shifting sands of the arguments of the United States and the role that judicial estoppel could play in curtailing advocacy of this nature. Act of February 8, 1887, (24 Stat. 388, ch. 119. 25 U.S.C. 331). At the very least, this focus should inform the perspective of the Court with reference to the legitimacy of the arguments of the United States.

ARGUMENT

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the public domain, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathways of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away.
>
> Report of Commissioner of Indian Affairs 8, (1891).

A. The General Allotment Act of 1887 provides the background for this litigation.

The passage of the General Allotment Act in 1887 did not constitute a fundamental change in federal Indian policy. Prior to 1887, it was the fundamental precept of federal Indian land policy that the ratification of a cession agreement would extinguish the Tribe's claim or title to the affected area. If the ceded area or area to be disestablished included only a portion of the reservation, the reservation boundaries would be necessarily diminished to include only the reduced area of the remaining reservation. If an entire reservation was to be ceded or disestablished, the boundaries were also necessarily disestablished, and the tribes involved usually were

required to remove to another reservation. In both instances, the area was automatically restored to the public domain and "opened" to homesteading. The consideration was usually a sum certain direct per capita cash payment to the tribe or individual members thereof.

After passage of the General Allotment Act, Congress continued to disestablish Indian reservations by tailoring cession agreements to conform with the guidelines set forth in Section 5 of the General Allotment Act. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In fact, disestablishment after passage of this Act took place at a much more rapid pace then had theretofore been possible.

In two respects, however, the post 1887 legislation differed materially from the earlier legislation. Most significantly, individual members of the tribes were assured under the General Allotment Act of individual acreages in the form of allotments. These individual allotments were made pursuant to Section 5 of the General Allotment Act. Act of February 8, 1887, (24 Stat. 388, 389, ch. 119. 25 U.S.C. 348). The land which remained after allotment was referred to as "surplus" or "surplus and unallotted" land. Section 5 of the General Allotment Act made provision for the eventual disposal of this surplus land. *Id.* The term "surplus land statute" was used to describe the entire process of disposing of this land subsequent to allotment. *Id.*

Secondly, those primarily responsible for the passage of the General Allotment Act professed a sincere belief that an individual member of a tribe who had received an allotment, as well as the United States, would be better off after a surplus land statute

was enacted and the surplus lands opened to settlement. The allotted member of the tribe would be exposed to "civilization" on his trust allotment, and this exposure was deemed a necessary step toward the status of citizenship. The trust allotment would be Indian country, but not an Indian reservation. *United States v. Pelican*, 232 U.S. 442 (1914). *See also* 18 USC §1151(c). Sale of the surplus land would create a fund which would serve as a source of income for the allottee until that status could be fully obtained. Moreover, the United States would, at the same time, be making available for cultivation vast tracts of land that had theretofore been lying idle. The allottee and the homesteader could cultivate the land side by side, and, as a result, the entire country would benefit. These were the "familiar forces" of Section 5 of the General Allotment Act the Court referred to in *DeCoteau*, 420 U.S. 425, 431.

In 1892, the Commissioner of Indian Affairs again addressed these forces at length in terms of letting "the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away." Report of the Commissioner of Indian Affairs, 136 (1892). As a graphic illustration of the "familiar forces," the Report stated that under Section 5 of the General Allotment Act "during the past three years more than 24,000,000 acres of Indian land had been restored to the public domain." Report of the Commissioner of Indian Affairs, 136 (1892). In retrospect, both the goals of this aspect of the General Allotment Act and some of the motives behind it may be questionable, but at the time they were wholeheartedly accepted in good faith.

An example of a surplus land statute enacted pursuant to Section 5 of the General Allotment Act

assists in explaining the operation and effect of such a statute. Assume a certain cession or sale for the entire eastern half of a reservation was proposed in 1888, but only a certain percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and cite Section 5 of the General Allotment Act which provided, in part:

> And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell*, . . .
>
> Act of February 8, 1887, (24 Stat. 388, 389, ch. 119. 25 U.S.C. 348).

This section would allow the United States to negotiate for the release of "such portions" of the reservation as were not allotted, regardless of the fact that only a certain percentage of allotments had yet been made, and these were scattered throughout the entire reservation. If the Secretary concurred with the proposal, he would appoint either one or several commissioners and ask that the Commissioner of Indian Affairs submit a "Draught of Instruction" for his approval. After approval, the instructions would be

forwarded to the commissioners. In most instances the information contained therein was of a very general nature.

The Commission would go to the reservation, negotiate with the tribe for the surplus lands and draw up a document for the approval of the Tribe containing the price per acre and such other specific provisions as the United States and the tribe might wish to resolve. In some cases the "cession" or "sale" terminology would appear in the text of the document, and in others it would not. In some cases, the "public domain" and "diminished reservation" terminology would be referred to repeatedly in the text of the document, and in others it would not. In all cases, the document would describe or separate the surplus area by some boundary marker or other survey from that portion of the reservation unaffected, i.e., the diminished reservation.

The only restriction in Section 5 on the method of payment for the "purchase and release" of "such portions" of the "reservation not allotted" that the Tribes were to "sell" was simply:

> Such term and conditions as shall be considered just and equitable between the United States and said tribe of Indians.
>
> *Id.*

Equally broad language in Section 5 governed the terms of the eventual disposal of the surplus portions of the reservation to the bona-fide settlers — "such terms as Congress shall prescribe." *Id.* Congressional discretion was virtually unlimited.

In exercising this broad discretion, the United States would ordinarily agree to purchase the surplus land directly from the Tribe for a sum certain. In all instances, however, the eventual disposition of the proceeds for the land was governed by Section 5:

> Purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians *to whom such reservation belonged.*
>
> *Id.*

The entire document would not be effective until ratified by Congress, again pursuant to the requirements of Section 5 of the General Allotment Act. In Washington, D.C., the document would be amended by the Congress to provide that the surplus lands to be sold or released by the Tribe would be held by the United States as trustee for the sole purpose of securing homes to actual settlers if it was adaptable for agricultural purposes again, pursuant to the requirement of Section 5 of the General Allotment Act.

The surplus portion of the reservation would thereby become essentially a part of the public domain when opened to homesteading upon amendment and ratification by Congress and Proclamation by the President. Any other portion of the reservation would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation. As for those individual members of the tribe whose allotments were now to be situated in the newly created public domain, they were generally given the option to remain so situated or to relinquish

their allotment and remove to the diminished reservation and reselect therein, if a diminished reservation existed. At a later date, this whole process could be repeated one or more times on the same reservation. The original reservation would be repeatedly reduced in size, with each surplus area restored to the public domain and opened to actual settlers. Again, many members of the Tribe would elect to remain situated in the "former" reservation areas.

There would be no question in this instance as to the effect of the document as ratified on the boundaries of the original reservation, even if construed in an historical vacuum. With each opening, there would necessarily be some delineation of the area opened from the area remaining as the diminished reservation. Most often this delineation would appear in the act as some type of metes and bounds description because during this period in most instances the territory or the states involved had not yet been surveyed into distinct county subdivisions, or the surplus area did not coincide with the county boundaries.

When an act provided for the opening of all of the unallotted surplus land of the reservation, however, the effect Congress intended was not so apparent. Initially, no one questioned the effect of surplus land statutes on the boundaries of any reservation. Disestablishment was assumed. To those at all familiar with the overall policy of the United States, the answer would have been an almost obvious corollary of the act itself. After all, these were the familiar forces of the era.

The lapse of time, however, and the absence of any singular concrete reference from which to readily obtain a proper historical perspective, together with the inconsistencies and policy reversals which characterized the whole arena of Indian affairs in later decades, understandably clouded the issue — especially in the aforementioned case of where the entire reservation was opened to settlement by such a statute. This was precisely the fact situation presented in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

DeCoteau authoritatively resolved the doubts. The fact situation in *DeCoteau* was clearly distinguishable from the untenable position rejected in *Moe v. Confederate Salish & Kootenai Tribes*, 425 U S. 463 (1976), *supra*, that allotment *per se* pursuant to *Section 6* of the General Allotment eventually disestablished reservations.

B. Judicial Estoppel.

The United States has had multiple inconsistent positions on the status of the Yankton Sioux Reservation. Judicial estoppel should bar the United States from asserting, contrary to its prior positions, its current argument that the Yankton Sioux Reservation has not been wholly disestablished, but includes approximately 37,410 acres held in trust by the United States. Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932).

Judicial estoppel precludes a party from asserting a position in one legal proceeding which is contrary to a position asserted in an earlier proceeding. *Davis v.*

Wakalee, 156 U.S. 680, 689 (1895). Most jurisdictions follow the prior success rule of judicial estoppel and will only apply it when the position asserted by the party in the previous proceeding was accepted by the tribunal. *Hossaini v. Western Missouri Medical Center*, 140 F.3d 1140, 1143 (8th Cir. 1998). Some apply an absolute version of the rule where any prior position in a judicial proceeding could be used to estop a later contradictory position. *Id*. In this case, the fact that the inconsistent positions have been asserted in different stages of the *same* proceeding over a period of many years also cuts against the legitimacy of the position of the United States.

Under either of these views, the United States should also be estopped from arguing that the 1858 reservation boundaries are still intact. The shifting sands of the arguments of the United States have been not only a deliberate attempt to suit the exigencies of the moment, but have also been successful in persuading some of the courts in the past. Judicial estoppel should apply.

A thorough analysis of the shifting sands of the arguments of the United States concerning disestablishment and diminishment was provided in the County's first *Amicus* Brief in this Court. Brief of Charles Mix County, South Dakota, as *Amicus Curiae*, in Support of Petitioner, State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) (now reproduced at County App. II, 460-501 (No. 10-932)). The most recent positions of the United States as they relate directly to the Yankton Sioux Reservation are noted in this brief

In 1984 the United States was involved in multiple cases where the cession-disestablishment of a reservation was at issue. In *Solem v. Bartlett*, 465 U.S. 463 (1984), which involved the Cheyenne River Sioux Reservation in South Dakota, the United States maintained the Congress had not diminished the reservation when authorizing the sale of surplus lands. In contrast, and perhaps to emphasize the distinction made in *Solem*, the United States conceded the 1894 act diminished the Yankton Sioux Reservation in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985), *rev'd in part*, 476 U.S. 734 (1986). *See* Opening Brief for the Federal Appellant at 16, 17 n. 10, and in *United States v. Dion*, 752 F.2d 1261 (8th Cir. 1985).

The United States also specifically cited with approval the controlling federal and state decisions that recognized and held that the 1858 Yankton Reservation was diminished or disestablished by the 1894 Yankton cession act:

> In 1858, the Yankton Sioux negotiated a treaty with the United States in which they "ceded and relinquished" to the United States all but 400,000 acres of the lands claimed by them. Treaty with the Yankton Sioux, Art. I, 11 Stat. 743 (April 19, 1858).... In 1894, Congress ratified an agreement with the Yankton Sioux which further diminished the size of their reservation. Act of August 15, 1894, § 12, 28 Stat. 286, 314. See *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir.1980); *State v. Williamson*, 211 N.W.2d 184 (S D.1973).
>
> Opening Brief of the Federal Appellant at 16, 17 n.10, *Dion*, 752 F.2d 1261.

Later, in *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (1986), the United States shifted position to one that supported the recognition of the 1858 Yankton Reservation. This is because the United States rarely fails to advocate the resurrection of original reservation boundaries, sooner or later, presumably because of a perceived obligation to support the tribal position regardless of the impact of its position would have on non-tribal residents.

In this Court the United States argued 1858 reservation boundary or no reservation boundary—all or nothing. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The argument of the United States did not convince this Court to recognize that the 1858 reservation boundary was maintained.

The United States, in the initial remand of the present line of cases, succeeded in convincing the district court to again recognize the 1858 boundaries of the Yankton Sioux Reservation. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135 (1998). And now, the United States argues that "[t]he court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States." Brief for the United States in Opposition, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931 and 10-932).

The purpose of the doctrine of judicial estoppel is "preventing intentional inconsistency," *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982), precluding a party from playing "fast and loose with the courts," *Scarano v. Central R.R.*, 203 F.2d 510, 513

(3d Cir. 1953) and prohibiting parties from "deliberately shifting positions to suit the exigencies of the moment." *Department of Transp. v. Coe*, 112 Ill. App. 3d 506, 510, 445 N.E.2d 506, 508 (1983).

This Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001), listed factors that assist the Court in determining whether judicial estoppel is appropriate:

> Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped "

Id. at 743.

The United States' prior arguments that the Yankton Sioux Reservation was diminished, as well as their previous position that the 1858 reservation boundaries were still intact are inconsistent with the current argument whatever that argument suggests. Any inconsistent statement harms the integrity of the judicial process and undermines public confidence in the judicial process.

The United States was successful in *Dion* in using its statement that the Yankton Sioux Reservation was diminished in order to perpetuate its argument in *Dion*. The United States was also successful in the *Yankton Sioux Tribe* case in convincing the district court and the court of appeals that Congress intended the Yankton Sioux Reservation to have its original 1858 boundaries. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F.Supp. 878 (D.S.D. 1995) and *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996). Even after this point was reversed by this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, the United States maintained their initial position and succeeded in the district court once again. *Yankton Sioux Tribe v. Gaffey*, 14 F.Supp.2d 1135. There, the district court once again resurrected the 1858 reservation boundaries of the Yankton Sioux Reservation. *Id.*

In the current stage of this proceeding, the United States has shifted its argument once more and no longer supports the Tribe's position that the 1858 reservation boundaries still exist. Brief for the United States, *Daugaard, et al. v. Yankton Sioux Tribe, et al.* (Nos. 10-929, 10-931, 10-932 and 10-1058); Brief for the Federal Respondents, *Yankton Sioux Tribe, et al. v. United States Army Corps of Engineers, et al.* (No. 10-1059). This situation is a prime opportunity to apply the doctrine of judicial estoppel. Congress could not have intended several alternative boundaries for the Yankton Sioux Reservation. The United States' current position is clearly inconsistent with several arguments previously submitted by the United States, successful in the district court during *Yankton Sioux*

Tribe v. Southern Missouri Waste Management Dist. and *Yankton Sioux Tribe v. Gaffey*.

The rules of judicial estoppel do not prevent inconsistent pleading, but once a court has adopted one theory the litigant cannot seek an inconsistent advantage on another theory. For this reason, the United States should be estopped from adopting an inconsistent position on what Congress intended in the 1894 Act.

The United States would derive an unfair advantage if it is not estopped from their current inconsistent position. The United States should not be allowed to shift its argument to a contrary position simply to suit the exigencies of the moment. The United States has given several inconsistent positions and interpretations on the same act. They cannot all be correct. Congress only had one intention in regard to the 1894 Act. The United States has succeeded in persuading a court to accept its earlier positions and judicial acceptance of its now proffered inconsistent position would create the perception that either the first or second court was misled by the United States.

The public policy concern in which this doctrine is grounded is the preservation of the integrity of the courts and judicial process *Edwards v. Aetna Life Ins. Co.*, 690 F.2d at 598. Another policy concern that has been articulated for judicial estoppel is upholding the sanctity of the oath. *Melton v. Anderson*, 32 Tenn. App. 335, 342-43, 222 S.W.2d 666, 669 (1948).

These public policy considerations would be furthered by the estoppel of the United States. If the United States is allowed to continue shifting

arguments to meet the exigencies of the moment, there will certainly be a perception that the same court was misled either here or in the past. This perception would undoubtedly damage the public's faith in the integrity of the courts. The application of judicial estoppel would also ensure a more consistent result.

For years, the United States has played "fast and loose" with the judicial process in reservation status cases. It has proffered multiple inconsistent arguments to fit current interests at the moment. At the very least, the credibility of the arguments is diminished. For all these reasons, judicial estoppel should apply to bar the United States' argument somewhere in these proceedings.

The only consistency in the arguments of the United States is that the United States consistently argued against reservation disestablishment in all three cession cases decided by this Court. This Court was consistent in rejecting the argument of the United States in all three. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

CONCLUSION

Amicus curiae Charles Mix County, while not agreeing this case cannot separately be resolved and affirmed, supports the conclusion of the State of South Dakota to not oppose holding this Petition until disposition of the lead disestablishment petitions to allow a full and fair presentation of the matter.

Respectfully submitted,

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